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OFFICE OF PETITIONS

In re Application of
Tyler Tierney, et al.
Application No. 10/068,196
Filed: February 4, 2002
Attorney Docket No. 06037

ON PETITION

This is a decision on the petition under the unintentional provisions of 37 CFR 1.137(b), filed October 18, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

The application appears to have become abandoned for failure to reply in a timely manner to the non-final Office action mailed, February 26, 2004, which set a shortened statutory period for reply of three (3) months. Further inspection of this application shows that the applicant never responded to the restarted period for reply to the Rule 47 decision of February 26, 2003, which set a two-month period for reply. No extensions of time under the provisions of 37 CFR 1.136(a) were obtainable. Accordingly this application became abandoned on April 27, 2003.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Director may require additional information. See MPEP 711.03(c)(II)(C) and (D). The instant petition lacks item (3).

The statement of unintentional delay signed by Charles F. Meroni, Jr. (reg. #20,109) has not been accepted. Charles F. Meroni, Jr. was not the attorney of record or the responsible party for the prosecution of the application at the time any response was due to avoid abandonment. Additionally, the record indicates that the law firm of Barnes & Thornburg, LLP was responsible for prosecution of the above-identified application when the reply necessary to avoid abandonment was due. Therefore, petitioner must provide a statement from the law firm of Barnes & Thornburg, LLP explaining why action was not timely taken to prevent the above-

identified application from becoming abandoned due to the lack of reply to the petition decision dated February 26, 2003 and the office action dated February 26, 2004.

Furthermore, there is evidence on the record to indicate that at least part of the delay was intentional. Petitioner clearly states that the reason for the delay in response to the office action "was the result of being faced with bankruptcy or continued patent prosecution, which bankruptcy was unlawfully forced upon petitioner. In an effort to remain credible in the financial community, Petitioner was essentially forced to discontinue prosecution of the subject patent application" (from p. 8 of the petition). It is noted that no documentary evidence of financial difficulties has been submitted. It is not apparent why any USPTO fees were necessary to reply to the non-final Office action of February 24, 2004 or the decision on petition dated February 26, 2003. Furthermore, it appears that the petitioner made the business decision to apply whatever funds were available on or about November 23, 2005 to the revival of application no. 10/039,570, as opposed to the revival of this application. This appears to be a conscious decision to continue the prosecution of the other application to the detriment of this case. Such reinforces the conclusion that the delay in this application is not unintentional as it results from a deliberate decision to defer the expense of revival for this application.

As such, it would appear that applicant made a conscious decision NOT to continue prosecution in view of financial difficulties which is therefore a deliberately chosen course of action on the part of an applicant and NOT considered "unintentional" within the meaning of 37 CFR 1.137(b).

While Petitioner credits financial problems as to the reason for delay, it should be noted that the application was abandoned for failure to respond to the non-final office action dated February 26, 2004. Therefore, no additional fees were required by the USPTO to file a response within the statutory time period set forth in the Office action to avoid abandonment. Petitioner states that the delay was caused by the fraudulent and frivolous activities of their employee Ms. Sandy Hogan along with the law firm of Barnes and Thornburg. It is unclear how the actions of Ms. Hogan who was fired in October 2001 had any direct affect on the application becoming abandoned in 2003. The filing date of the application was after termination of Ms. Hogan so it would appear that Ms. Hogan was not directly involved in the prosecution of this application.

It is also requested that the applicant provide copies of all correspondences and communications between Barnes & Thornburg and Meroni & Meroni as to the preparation of a reply to (1) the decision on petition dated February 26, 2003, and also as to the preparation of the Office action of February 26, 2004.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

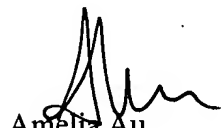
Further correspondence with respect to this matter should be addressed as follows:

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The centralized facsimile number is **(571) 273-8300**.

Telephone inquiries concerning this decision should be directed to the April Wise at (571) 272-1642.



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